Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2003

GEORGE D. KING,
Petitioner

v.

STATE OF INDIANA
Respondent

On Petition for Writ of Certiorari to the
Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do the principles of *Smith v. Illinois*, *Chambers v. Mississippi*, and *Davis v. Alaska* dictate that a criminal defendant be permitted to cross-examine a key prosecution witness about discussions he had with a third person regarding the crime before giving his first recorded statement to police?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

Petitioner George D. King ["King"] respectfully petitions for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

I

OPINIONS OF OTHER COURTS

On November 24, 2003, the Indiana Court of Appeals issued an opinion on direct appeal affirming King's convictions for attempted murder. *King v. State*, 799 N.E.2d 42 (Ind.App. 2003) [Appendix Page 1]. The Indiana Supreme Court denied King's Petition for Transfer without opinion on February 4, 2004. [Appendix Page 17].

II

JURISDICTIONAL STATEMENT

King seeks review of the judgment entered by the Indiana Court of Appeals on November 24, 2003, affirming his convictions.

An application for extension of time within which to file a petition for writ of certiorari, Application No. 03A885, was presented to Justice Stevens, who extended the time to file a petition to and including June 3, 2004.

The jurisdiction of this Court to entertain a petition for Writ of Certiorari from the judgment is invoked pursuant to 28 U.S.C. §1257(a) and Rule 10 since the judgment sought to be reviewed is a final

judgment of the state court of last resort in the State of Indiana, and the case presents a federal question.

III

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THE CASE

A. Constitutional Provisions which are Involved

1. Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Amendment 14

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. State Rules which are Involved

1. Indiana Evidence Rule 103.

(a) **Effect of Erroneous Ruling**. Error may not be predicated upon a ruling which admits or excludes

evidence unless a substantial right of the party is affected, and

* * * *

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

1. **Indiana Evidence Rule 611.**

(a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation of evidence effective for the ascertainment of the truth, (2) avoid needless consumption of time, and protect witnesses from harassment and undue embarrassment.

(b) **Scope of Cross-Examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

IV

STATEMENT OF THE CASE

Kay King and her fifteen year old son, C.K., were shot several time by a masked assailant the night of November 14, 2001. They were shot after C.K. pulled their car into the attached garage at their home on the north side of Indianapolis, Indiana. Kay King was seated in the front passenger seat.

The assault happened fast and unexpectedly. A

masked assailant appeared on the passenger side of the car after C.K. had removed the key from the car's ignition. The assailant's mask was a full-face ski mask which left only eyes and mouth visible. He was wearing a worn trench coat and had a paper sack over his right hand.

The assailant immediately took the sack off his right hand revealing a revolver. He fired two shots through the glass of the front passenger door window. Kay King was struck by the first or second shot. C.K. was struck in the shoulder by the second shot.

After these first shots, the assailant began reaching and leaning into the car. He initially tried to open car door by unlocking it and grabbing the door handle. Kay King thwarted these efforts by re-locking the door with her elbow. When Kay King attempted to call 911 on her cell phone, the assailant hit the phone and knocked it out of her hands.

The assailant shot several times as he reached inside the passenger compartment. On one occasion the assailant placed the gun to C.K.'s head. Before he could fire the gun Kay King kicked and pushed the assailant out of the car with her legs.

Kay King suffered gunshot wounds to her shoulder, jaw and hand. C.K. suffered wounds to his neck and shoulder.

The Kings escaped when C.K. found the car keys his lap, restarted the car, backed it out of the garage, and drove away. They drove to a nearby fire station where firemen began rendering first aid. Kay and C.K. told the firemen King had shot them when they were asked who hot them.

King was interviewed by police six days after the shooting. He denied shooting his sister and nephew. He told police he had attempted to visit an old friend at

a nursing home and visited his minister the night of the shooting. King was released after giving police a statement, but some two months later he was arrested and charged with attempting to murder Kay King, his sister, and C.K., his nephew.

The sole question at King's trial was whether he shot his sister and nephew. There was no physical or trace evidence connecting King to the shooting. Neighbors testified that they saw a dark figure run from the scene, but they could make no identification. There was evidence that King and his sister had not gotten along for several decades and there was evidence that King had taken mail from Kay King's mail box. However, there was no specific evidence that King had a motive to kill his sister and nephew.

A nursing home receptionist and minister confirmed much of King's story as to where he had been the night of the shooting. The time period that he was at these locations was in dispute. And, the places where King had been that night were located within minutes of Kay King's house.

Ultimately, the prosecution's case rested on the credibility of Kay King and C.K.'s identification of King. To enhance their credibility, the prosecutor sought to demonstrate that Kay King and C.K.'s identification of King was accurate and reliable. It was the prosecution's theory that the jury should believe Kay King and C.K.'s identification because there stories were consistent. They both identified King as the shooter to the firemen without hesitation. And, they recognized King to be the masked assailant based on observing very same characteristics during the brief and violent struggle inside the garage.

Kay King and C.K. had both identified King as the shooter to the firemen. However, the first fireman

to reach their car testified on cross-examination that C.K. was next to his mother when she first identified her brother as the shooter. Moreover, a hospital social worker who met with C.K. the day after the shooting reported that he told her he was not sure who shot him and his mother.

C.K. had told the investigating detective in a brief, unrecorded statement at the hospital that he believed it was his uncle because the assailant wore tennis shoes like his uncle's and he fit the assailant's description and size. However, he provided few details about the assailants' description at that time. At trial, the language of C.K.'s description of the assailant was virtually identical to his mother's. They both described the gunman's eyes as being "brown with a greenish tint," like King's. The eyes were "deep-set" with "eyebrows hanging over." Both described the expression in the assailant's eyes as "hard," "intense," and "hateful" and claimed they had seen this same expression in King's eyes before at the very same time and place. Both had told police in their recorded statements that the manner in which the assailant stood by the car was "exactly the same way" King stood next to their car one time over a year before the shooting.

C.K. and Kay King both claimed they recognized the assailant's hands as George King's because they were "bony, skinny hands" with "long dark hairs on the back of them". They testified the assailant was of "small build" and had "slumped over" posture, just like King.

The defense sought to establish that C.K.'s identification was coached and tailored to match his mother's story. He acknowledged discussing some of descriptive terms with his mother. He also acknowledged that his mother hired a lawyer with whom he spoke. However, when defense counsel asked

C.K. if this lawyer had taken him "through a lot of the details" of the shooting, the trial court ruled that the defense could "ask ... whether [Chris] spoke with" the lawyer but he could not cross-examine on "what they spoke about."

C.K. subsequently admitted that the attorney provided him was a typewritten outline of questions about the assailant's description during the meeting before he gave his recorded statement to police. Chris King acknowledged using this document when he gave his only recorded statement over the telephone to police from Lafayette, Indiana where he was staying with relatives.

C.K. denied that he had any written answers to the questions on the document he received from the attorney. However, the relative with whom he was staying testified that the document she saw C. K. use in giving his taped statement to police had handwritten answers below typewritten questions. She further testified C.K. had been told to "shred this document."

On direct appeal, King claimed his Sixth Amendment right to effective cross-examination was violated when the trial court precluded cross-examination into the content of C.K. 's discussions with this attorney. The Indiana Court of Appeals held there was no error because the substance of the evidence sought to be elicited was not apparent from the context of the cross-examination [Appendix A *]. This claim was presented to the Indiana Supreme Court in a petition for transfer seeking discretionary review. However, transfer was denied without opinion.

V

REASONS FOR GRANTING THE WRIT

The Confrontation Clause of the Sixth Amendment guarantees an accused the right to confront and cross-examine the witnesses against him. *Davis v. Alaska*, 415 U.S. 308 (1974). The main and essential purpose of the Confrontation Clause is to secure for the accused the opportunity to cross-examine the witnesses against him. *Id.* The Sixth Amendment guarantees an opportunity to effectively cross-examine the witnesses. *Id.*

The right to effective cross-examination is violated when an accused is prohibited from "engaging in otherwise appropriate cross-examination designed to show a prototypical form" of impeachment. *Olden v. Kentucky*, 488 U.S. 227 (1988). The Sixth Amendment guarantees the right of the accused to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis* at 315; see also, *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Smith v. Illinois*, 390 U.S. 129 (1968).

Trial judges retain discretion to impose reasonable limits on the scope and extent of cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Limits like those imposed by IND. EVIDENCE RULE 611 to avoid harassment, prejudice, confusion of issues, and to ensure the witness' safety. *Id.* Cross-examination that is repetitive or marginally relevant can be restricted. *Id.* However, a trial judge cannot constitutionally limit an accused's attempt to cross-examine a witness on an essential area of witness credibility absent a paramount state interest in

restricting such cross-examination. *Smith, supra.*

The essentials areas of cross-examination which this Court has recognized to date include the right to examine key witnesses regarding their name and address. *Smith, supra.* Absent a showing of a threat to witness safety or some other paramount interest, these subjects cannot be made off-limits because they "open countless avenues of in-court examination and out-of-court investigation." *Smith* at 131.

The witness in *Smith* admitted on cross-examination that the name he gave in court was not his real name. Yet, the trial court sustained objections to the defendant's follow-up cross-examination questions as to the witness's real name and where he lived. Given the admitted falsity of his name, the *Smith* Court reasoned that "the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives." *Id.* at 131.

The *Smith* Court, quoting *Alford v. United States*, 282 U.S. 687 (1931) with approval, further noted that the right to effective cross-examination is violated even if the cross-examiner is unable to tell the trial court what facts might be developed by his line of questioning.

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly

> appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . ."

Smith at 132.

Another essential area of credibility where a cross-examination cannot be constitutionally curtailed is prior contradictory extrajudicial statements of a key prosecution witness. *Chambers v. Mississippi*, 410 U.S. 284 (1973). A key witness's prior contradictory statements provide a "'prototypical form' of impeachment." *Smith v. Fairman*, 862 F.2d 630 (7th Cir. 1988). The *Chambers* Court held that a defendant's opportunity to cross-examine a key witness about statements contradicting the witness's in-court cannot be curtailed by an unreasonable state rule. *Chambers* at 296-98.

"Cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witnesses as they may relate directly to the issues or personalities in the case" provides a particularized avenue of credibility attack. *Davis* at 316. Exposing a "witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.*, citing, *Greene v. McElroy*, 360 U.S. 474 (1959). *Davis* teaches that precluding a defendant from developing a factual basis for why a key witness might be biased, prejudiced or motivated to testify a certain way violates the Sixth Amendment's guarantee to effective cross-examination.

The question presented here is whether cross-examination of a key prosecution witness as to whether and with whom he has discussed the facts of the case is likewise an essential area of cross-examination. Where the identification is the main issue, prior descriptions can be used to demonstrate descriptive details have been added during the witness' in-court testimony that were not present in earlier ones. Such circumstances may raise the implication that the witness has been coached. See, *Kyles v. Whitley*, 514 U.S. 419 (1995). An embellished in-court description which more closely matches the characteristics of the accused suggests that witness may be intentionally tailoring his testimony to obtain the defendant's conviction.

The first step to revealing the existence of testimonial tailoring and coaching is examination of the witness regarding with whom he has discussed the details of the crime and what have they discussed. The defendant must be given the opportunity to expose these details to the jury during cross-examination so they can be considered by the jury in making its credibility determination.

The danger that testimony may have been tailored to fit with the testimony of others or be coached or influenced by others is always present. Safeguards against the tailoring of testimony to testimony already given at trial are typically in place when a trial begins through the centuries long practice of witness sequestration rules. See, *Geders v. Untied States*, 425 U.S. 80 (1976).

As this Court recognized in *Geders*, the object of sequestration rules is to prevent testimonial tailoring and coaching during a trial:

> The aim of imposing "the rule on

> witnesses," as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid. Sequestering a witness over a recess called before testimony is completed serves a third purpose as well - preventing improper attempts to influence the testimony in light of the testimony already given.

Id. at 87 (citations omitted).

This Court has also recognized that the possibility that a witness's testimony may have been tailored or influenced by others is a proper subject of credibility which may be brought to the jury's attention, even if the witness is the defendant. *Portuondo v. Agard*, 529 U.S. 61 (2000). The *Portuondo* Court rejected contentions that prosecutorial comments on a defendant's opportunity to tailor his testimony from what he has heard at trial violate the Fifth or Fourteenth Amendments.

In so holding, the *Portuondo* Court acknowledged that testimonial tailoring by any witness during a trial threatens the integrity of the trial. The "antidote" to this threat, as recognized by the Court in *Brooks v. Tennessee*, 406 U.S. 605 (1972), is to let the jury know of its possible existence. *Portuondo* at 70. "The adversary system surely envisions -- indeed it requires – that the prosecutor be allowed to bring to the jury's attention the danger" that a defendant's testimony has been tailored to fit the testimony of witnesses. *Id.* at 70.

In the case of testimonial tailoring and coaching

that might occur before the trial, witness sequestration orders provide not protection. The only way of safeguarding the integrity of the trial process from the threat of testimonial tailoring and coaching before trial commences is to allow cross-examination into this area. A defendant must be permitted to pursue a line of questioning in cross-examination to determine with whom and what a key witness's has discussed regarding the details of the crime. This is especially imperative where other evidence suggest this is more than a mere possibility. A witness who has discussed the details of the case with someone else may not necessarily be relying upon his independent recollection of the facts, but upon the facts rehearsed to him by others.

The trial court's order precluding King from delving into C.K.'s discussions with his mother's attorney violated King's right to effective cross-examination. Examining C.K. regarding those discussions was likely to open avenues for challenging the credibility of C.K.'s testimony. The limitation cut off King's ability to effectively establish the factual premise for discrediting C.K.'s testimony before the jury, much as the limitations did in *Chambers*, *Smith*, and *Davis*.

C.K. had not yet given his recorded statement to police when he met with his mother's attorney. It is evident that the purpose of this meeting was the facts and circumstances surrounding the shooting. The typewritten outline of questions he received from the attorney substantiates this. At a minimum, the presence of his mother at this meeting, the only other eyewitness to the shooting, created a danger that the details he later provided to police were the product of her recollections, not his.

Significant descriptive details appeared in C.K.'s description of the assailant after this meeting. And, the

doubts he had expressed to a social worker about the assailant's identify disappeared.

There was no reasonable justification for the limits the trial court imposed on King's cross-examination. The State's hearsay objection, which appears to be the basis of the trial court's ruling, is completely unsupported by law. King was attempting to examine C.K. about prior statements for impeachment purposes. Prior extrajudicial statements of a key witness are a prototypical form of impeachment.

No claim of attorney-client privilege was made, and there is nothing in the trial judge's ruling to suggest it was the basis of his ruling. Further evidence that the attorney-client privilege played no part in the ruling appears in the trial judge's subsequent ruling which permitted the prosecutor to have C.K. testify on redirect that the attorney never told him how to answer the questions on the typewritten document.

Even assuming *arguendo* that privilege played any part in the ruling, there is no evidence that an attorney-client relationship existed between C.K. and the attorney. *Mayberry v. State*, 670 N.E.2d 1262 (Ind. 1996) (Party claiming privilege must establish that communication occurred in the course of an effort to obtain legal advice or aid, on the subject of the client's rights or liabilities, from a professional legal advisor acting in his or her capacity as such.) Moreover, once the client himself testifies concerning the privileged matter, the privilege is waived. *Key v. State*, 235 Ind. 172, 132 N.E.2d 143 (1956).

King was precluded from interrogating C.K. about what the attorney said to him about the details of the crime, and therefore could not learn the substance of what the attorney said to C.K. and what C.K. told the attorney. The cross-examiner cannot be presumed to

know that which he is precluded from inquiring about. *Hernandez v. State*, 439 N.E.2d 625, 628 (Ind.1982).

In addition, the claim clearly reserved for review on appeal. If "the substance of the evidence ... was apparent from the context within which the questions were asked," IND. EVIDENCE RULE 103(a)(2), then the claim is preserved for review on appeal. The context of King's cross-examination question clearly revealed the substance of the evidence he was seeking.

Cross-examination into C.K.'s discussions with the attorney were highly relevant in demonstrating King's claims that C.K.'s testimony was coached and the product of collusion. Evidence that a witness has been coached as to the description of the criminal act is highly relevant to the credibility of the witness' trial testimony. See, *Meadows v. State*, 252 Ind. 1, 238 N.E.2d 281 (1968).

Here the trial court ruled that King could ask whether C.K. spoke with the attorney, but precluded any cross-examination as to what they spoke about. Interrogation about what they spoke about was the very area that was likely to lead to the information casting doubt on the credibility of C.K.'s identification. It might have even led to evidence contradicting Kay King since she was present. In essence, the trial judge allowed King to lead the jury to where the truth might be found, but precluded King from exposing that truth to the jury. The total denial of cross-examination on this area of C.K.'s credibility constitutes a violation of his right constitutional right to effective cross-examination.

The line of questioning precluded here was no less essential than the line of questioning found to be essential in *Smith*, *Chambers*, and *Davis*. Because "the jury's estimate of the truthfulness and reliability" of C.K. may well have been determinative of King's guilt or

innocence, any evidence which sheds light on a key witness' credibility is critical to the jury's assessment. *Napue v. Illinois*, 360 U.S. 264, 269 (1959)

VI

CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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GEORGE D. KING, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.

No. 49A04-0301-CR-37

COURT OF APPEALS OF INDIANA, FOURTH DISTRICT

799 N.E.2d 42; 2003 Ind. App. LEXIS 2165

November 24, 2003, Filed

SUBSEQUENT HISTORY: Transfer denied by *King v. State, 2004 Ind. LEXIS 106 (Ind., Feb. 4, 2004)*

PRIOR HISTORY: APPEAL FROM THE MARION SUPERIOR COURT. Cause No. 49G03-0201-FA-3711. The Honorable Cale Bradford, Judge.

DISPOSITION: Affirmed.

COUNSEL: ATTORNEYS FOR APPELLANT: VICTORIA B. EIGER, NATHAN Z. DERSHOWITZ, Dershowitz, Eiger, & Adelson, P.C., New York, New York. BRENT WESTERFELD, Indianapolis, Indiana.

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JUDGES: BROOK, Chief Judge. BAKER, J., and SHARPNACK, J., concur.

OPINIONBY: BROOK

OPINION:

BROOK, Chief Judge

Case Summary

Appellant-defendant George D. King appeals his convictions for two counts of attempted murder,[1] n1 a Class A felony. We affirm.

Issues

King presents five issues for our review, which we restate as follows:

I. Whether the State presented sufficient evidence to support his attempted murder convictions;

II. Whether the trial court erred in denying his motion for mistrial;

III. Whether the trial court erred in limiting cross-examination of a witness;

IV. Whether the trial court abused its discretion in admitting certain evidence; and

V. Whether the trial court abused its discretion in refusing his tendered jury instruction.

Facts and Procedural History[2]

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[1] *Ind. Code § § 35-41-5-1, 35-42-1-1.*

[2] We remind King's counsel that the statement of facts in an appellate brief should be a concise narrative of the facts stated in accordance with the standard of review appropriate to the judgment and should not be argumentative. *See* Ind. Appellate

King and Kay King ("Kay") are brother and sister. Their father, George King ("George"), was a multimillionaire.[3] In 1999, Kay worked for George's investment company, and he gave Kay power of attorney. King lived with George at his residence in Indianapolis. Kay and King had a strained relationship and often quarreled over who would control George's multimillion-dollar estate after his death.

In the summer of 2000, Kay and King clashed. King yelled, "I'm going to kill you." Tr. at 194. Dana Miller, George's nursing aid, witnessed part of the fight. Miller heard Kay ask King, "Are you going to shoot me?" *Id.* at 570. Miller saw King nod his head affirmatively and respond, "Yeah." *Id.*

In October 2001, Kay saw King remove mail from her mailbox. During the same timeframe, one of Kay's neighbors saw King's car stop at Kay's mailbox on numerous occasions. Later, Kay learned that change-of-address orders had been executed with the post office that changed the delivery of her investment and trust accounts to George's address, where King lived.

On the evening of November 14, 2001, Kay's fifteen-year-old son, C.K., drove her home from his confirmation class. C.K. pulled into their garage and turned off the car. As C.K. and Kay sat talking, a man wearing a ski mask and trench coat appeared on the passenger side of the car. He had his right hand covered with a fast-food sack. The man removed the sack and fired a revolver at Kay and C.K. through the passenger window. C.K. was shot twice, in his neck and shoulder.

Rule 46(A)(6).

[3] George died in December 2001.

Kay was shot five times; she sustained injuries to her face, shoulder, and hand. C.K. restarted the car and backed out of the garage. The assailant pursued them and continued to fire at Kay and C.K. as they drove away. Kay's neighbors reported seeing a thin man, with a stature similar to King's, wearing dark clothing and running away from Kay's garage that night.

C.K. sought help at a nearby fire station. Firefighters administered medical aid to Kay and C.K. before they were transported to the hospital. When firefighters questioned Kay and C.K. as to the identity of their attacker, they both identified King as the assailant. *Id.* at 469, 480, 485. Marion County Sheriff's Deputy Bradley Beaton interviewed C.K. at the fire station. C.K. told Deputy Beaton that King had shot him and his mother. C.K. said that he recognized King as the assailant because of his eyes, mouth, and build. *Id.* at 718. Later at the hospital, Marion County Sheriff's Department Detective John Maloney interviewed Kay and C.K. separately; both identified King as the attacker. *Id.* at 732, 734.

On January 9, 2002, the State charged King with attempted murder, aggravated battery[4] as a Class B felony, battery [5] as a Class C felony, and carrying a handgun without a license[6] as a Class A misdemeanor. On August 20, 2002, after reviewing Kay's medical records, King moved for a mistrial so that he could investigate whether Kay's identification testimony was

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[4] *Ind. Code § 35-42-2-1.5.*

[5] *Ind. Code § 35-42-2-1.*

[6] *Ind. Code § 35-47-2-1.*

a product of hypnosis. The trial court denied King's motion. On August 22, 2002, a jury found King guilty on all counts. The trial court entered judgment of conviction only on the two attempted murder counts. King now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

King challenges the sufficiency of the evidence supporting his attempted murder convictions. King contends that the identification evidence is unreliable because Kay and C.K.'s recorded statements to police, a month after the shooting, were more descriptive than the statements they initially gave to firefighters and police after the incident. Appellant's Br. at 20-21.

> Our standard of review when considering the sufficiency of evidence is well settled. We will not reweigh the evidence or consider the credibility of witnesses. Only the evidence most favorable to the verdict together with all reasonable inferences that can be drawn therefrom will be considered. If a reasonable trier of fact could have found the defendant guilty based on the probative evidence and reasonable inferences drawn therefrom, then a conviction will be affirmed.

Livermore v. State, 777 N.E.2d 1154, 1161 (Ind. Ct. App. 2002) (citations omitted).

Immediately after the shooting, Kay and C.K. identified King as the assailant to firefighters who

administered medical aid to them. Tr. at 469, 480, 485-86. At the fire station, C.K. told Deputy Beaton that King had shot him and Kay. *Id.* at 718. Later at the hospital, Kay and C.K. told Deputy Maloney that King was the assailant. *Id.* at 732, 734. Kay and C.K. stated that King wore a ski mask and trench coat during the shooting but that they recognized him because of his eyes, frame, posture, and hands. *Id.* at 226-28, 422-23. Kay and C.K. testified that King shot them several times with a revolver. *Id.* at 217-23, 414-16. In all of their statements, Kay and C.K. unequivocally identified King as their assailant. *Id.* at 469, 480, 485, 732, 734, 216, 412. We decline King's invitation to reweigh the evidence and assess the credibility of witnesses. The identification evidence is sufficient to support King's convictions for attempted murder. *See Hubbard v. State, 719 N.E.2d 1219, 1220 (Ind. 1999)* (finding victim's testimony sufficient to support attempted murder conviction).

II. Denial of a Mistrial

On the second day of trial, King moved for a mistrial. He claimed that Kay was hypnotized before giving her recorded statements to police and that, before hypnotically refreshed testimony could be admitted, the court needed to conduct an evidentiary hearing to determine the nature of the hypnosis. Tr. at 253-54. King contends that the trial court abused its discretion in denying his motion for mistrial. "A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation." *Kirby v. State, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002), trans. denied* (2003). "The determination of whether to grant a mistrial is within the trial court's discretion, and we

will reverse only for an abuse of that discretion." *Id.* An abuse of discretion has occurred if the court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id. at 534.* "When determining whether a mistrial is warranted, we must consider whether the defendant was placed in a position of grave peril to which he should not have been subjected." *Id.* "The gravity of the peril is determined by the probable persuasive effect of the matter complained of on the jury's decision." *Id.* Moreover, a defendant is limited to the grounds advanced at trial and may not raise a new ground for objection for the first time on appeal. *Jackson v. State, 712 N.E.2d 986, 988 (Ind. 1999).*

At trial, King made an offer of proof and inquired into the nature of Kay's medical treatment while hospitalized. Specifically, King asked Kay about an annotation in her medical record which read:

> [Patient] states once she calmed down, she was able to breath. [Discussed] possibility of panic attacks & educated her as to what happens [with] a panic attack. Told her to also mention her symptoms to her M.D. [Patient] was responsive to clinical hypnosis & was able to obtain good level of relaxation. Offered reassurances [regarding] her safety, discussed son's situation & his return to school.

Appellant's App. at 192-93.

Kay denied that she was hypnotized. Tr. at 260. Kay explained that she was having problems breathing and experienced panic attacks. *Id.* at 262-64. Kay testified that a health care provider instructed her on

relaxation techniques and breathing exercises to help her alleviate her symptoms. *Id.* King did not establish that Kay was hypnotized. Moreover, Kay unequivocally identified King as her assailant before giving her recorded statements to police. To the extent King argues on appeal that Kay's identification testimony was inadmissible under Indiana Evidence Rule 602,[7] he has waived this argument. The trial court did not abuse its discretion in denying the mistrial because the facts do not demonstrate that King was placed in a position of grave peril by Kay's identification testimony.

III. Limitation of Cross-examination

Prior to giving their recorded statements to police, Kay and C.K. met with an attorney. King contends that he was precluded from questioning C.K. about the details of his conversations with the attorney regarding the shooting. King asserts that the trial court abused its discretion in limiting his cross-examination of C.K. At trial, the following exchange took place between King's counsel and C.K.:

> Q. All right. And before then, your mother had hired a lawyer, isn't that correct?
> A. Yes.

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[7] Indiana Evidence Rule 602 provides in relevant part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis."

Q. A fellow by the name of Bob Saint?
A. Yes.
Q. And Mr. Saint took you through a lot of the details of this, did he not?
Mr. Dickerson [the State]: Well, I'm going to object to that, Judge. Anything that -- if he's implying that something was said to him, I'm going to object to it as hearsay, and that's the way I understand the question, that he was --
The Court: Hearsay objection. Response?
Mr. Kammen [defense counsel]: I'm not asking for the contents. I'm just asking for the fact.
The Court: Well, if you ask him what he talked about, that includes --
Mr. Kammen: He just -- he had a conver- -- it's not offered clearly for the truth of the matter asserted.
The Court: You can ask him whether he spoke with Mr. Saint. As to what they spoke about will not be admitted. All right? So the --
Q. Well, you spoke with Mr. Saint about these events, didn't you?
The Court: Sustained.
A. Uh --
Mr. Kammen: No, don't answer that.
Q. In any event, on December 12th, you had a conversation with Detective Maloney, correct?
A. Yes.

Tr. at 440-41.

King argues that the trial court erred in

preventing him from challenging C.K.'s testimony as a product of "coaching." Appellant's Br. at 16. The right to cross-examine is a fundamental right of our criminal justice system. *West v. State, 755 N.E.2d 173, 183 (Ind. 2001).* Nonetheless, trial judges retain wide latitude to impose reasonable limits based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. *Id. at 183-84.* To preserve a trial court's allegedly erroneous exclusion of evidence for appeal, it is "appropriate and necessary for counsel to make an offer of proof on cross-examination if she believes the trial court has limited a line of questioning or has erroneously sustained an objection by opposing counsel." *Arhelger v. State, 714 N.E.2d 659, 666 (Ind. Ct. App. 1999)*; *see also* Ind. Evidence Rule 103. "The offer may be made immediately upon the judge's sustaining of opposing counsel's objection, or before the judge rules on the objection." *Id.* The offer must (1) make the substance of the excluded evidence or testimony clear to the court; (2) identify the grounds for admission of the testimony; and (3) identify the relevance of the testimony. *Id.* However, Indiana Evidence Rule 103(a)(2) provides that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked."

Here, King's counsel made no offer of proof before or after the trial court sustained the State's objection to the line of questioning. The substance of the evidence he sought to elicit from C.K. was not apparent from the context of King's questions. King failed to create a record for our review as to the substance and

nature of the precluded testimony. Therefore, he has waived this issue on appeal. *See West, 755 N.E.2d at 173.*

IV. Admission of Evidence

Kay's employee Howard Harrison testified that after the shooting, he saw King watching the hotel where Harrison worked, a place Kay was known to visit. King argues that the trial court abused its discretion in admitting Harrison's testimony because it was irrelevant, highly prejudicial, and inadmissible character evidence. "A trial court is vested with broad discretion in ruling on the admissibility of evidence." *Edmond v. State, 790 N.E.2d 141, 144 (Ind. Ct. App. 2003), trans. denied.* An error in admission of evidence will be not result in reversal of a conviction if the error is harmless. *Id.* "An error will be viewed as harmless if the probable impact of the evidence upon the jury is sufficiently minor so as not to affect a party's substantial rights." *Id. at 144-45.*

On appeal, King contends for the first time that Harrison's testimony should have been excluded under Indiana Evidence Rule 404(b).[8] A defendant is limited to the grounds advanced at trial and may not raise a new ground for objection for the first time on appeal. *Jackson, 712 N.E.2d at 988.* King objected to the

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[8] Indiana Evidence Rule 404(b) provides in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."

evidence at trial under relevance and prejudice grounds. Accordingly, he has waived his Rule 404(b) claim.

We will consider the admissibility of Harrison's testimony only under Indiana Evidence Rules 401 and 403. Evidence Rule 401 provides, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Evid. R. 403.

The State contends that Harrison's testimony was relevant to confirm King's identity as the person who shot Kay. The State argues that the evidence created a reasonable inference that King was looking for Kay after the shooting, when she was in hiding. King counters that the evidence was irrelevant and that its prejudicial effect substantially outweighed its probative value. The State's argument is tenuous at best, but given the victim identification evidence presented at trial, it is unlikely that Harrison's testimony substantially influenced the jury's verdict. The trial court's error, if any, in admitting Harrison's testimony was harmless.

V. Jury Instruction

King argues that the trial court's witness credibility instruction was one-sided and misleading because it did not advise the jury that it could reject a witness's perjured testimony. He contends that the trial court abused its discretion in refusing his "falsus in uno" instruction because it was a correct statement of the law

and supported by the evidence. King tendered the following instruction on witness credibility:

> If you should believe from the testimony in this case that any witness or witnesses have willfully and intentionally testified falsely as to any material fact in the case, intending by such false testimony to mislead and deceive as to the truth in the case, you may under such belief disregard the whole or any part of the testimony of such witness or witnesses if, in your opinion, you are justified under your oath in so doing and except insofar as the same be corroborated by other credible testimony.

Appellant's App. at 107. The trial court refused King's instruction and gave this instruction:

> You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witnesses, you may take into account his or her ability and opportunity to observe; the memory, manner, and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in light of all evidence in the case.

> You should attempt to apply the evidence to the presumption that the defendant is innocent and the belief that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. However, if you find that the testimony of a witness is so unreasonable as to be unworthy of belief, or if you find conflict between the testimony of the witnesses to the extent that you cannot believe all of them, then you must determine which of the witnesses you will believe and which of them you will disbelieve.
>
> In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience, and common sense gained from day to day living. You may find that the number of witnesses who testify to a particular fact, on one side or the other, or the quantity of evidence on a particular point is in conflict with your own determination of the truth, and in such case you should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

Appellant's App. at 97. The trial court also gave this instruction:

> Evidence that on some former occasion, a witness made a statement or statements

> that were inconsistent with his testimony in the trial, may be considered by you not only for the purpose of testing the credibility to the witness, but also as evidence as to the truth of the facts as stated by the witness on such former occasion.

Appellant's App. at 115.

It is well settled that the manner of instructing a jury is left to the sound discretion of the trial court; we will reverse only if the court abuses that discretion. *Smith v. State, 777 N.E.2d 32, 34 (Ind. Ct. App. 2002), trans. denied.* An abuse of discretion occurs if the instructions, considered as a whole and in reference to each other, mislead the jury as to the applicable law. *Chambers v. State, 734 N.E.2d 578, 580 (Ind. 2000).* A trial court does not abuse its discretion in refusing a defendant's instruction where the substance of the proposed instruction is covered by other instructions given to the jury. *Id. at 581.* In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction correctly states the law; whether there is evidence in the record to support the giving of the instruction; and whether the substance of the tendered instruction is covered by other instructions that are given. *Smith, 777 N.E.2d at 34.*

Here, the trial court's instructions informed the jury that it was the exclusive judge of the credibility of witnesses and that with careful consideration it could disregard the testimony of any witness if it had reason to do so. Appellant's App. at 97, 115. This instruction sufficiently informed the jury of its obligation to judge the credibility of witnesses. Moreover, the trial court's instructions were correct statements of law and

adequately covered the substance of King's rejected instruction. The trial court did not abuse its discretion in giving a broader instruction on witness credibility than that proposed by King. *See Chambers, 734 N.E.2d at 581* (concluding that trial court did not abuse its discretion in refusing to dwell on point raised by defendant's proposed instruction).

Affirmed.

BAKER, J., and SHARPNACK, J., concur.

CLERK
SUPREME COURT, COURT OF APPEALS, AND TAX COURT

STATE OF INDIANA
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317-232-1930 FAX 317-232-8365

David C. Lewis
Clerk

Cause Number
49A04-0301-CR-00037
Lower Court Number:
49G030201FA3711

KING, GEORGE D. -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 2/4/04

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT

JUSTICE'S VIEW ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR.

WITNESS my name and the seal of this Court
this 4TH day of FEBRUARY 2004

S/ David C. Lewis
Clerk, Supreme Court, Court of Appeals and Tax Court